A **KETUA PENGARAH HASIL DALAM NEGERI**

v.

MALAYSIAN BAR

B HIGH COURT MALAYA, KUALA LUMPUR
WAN AFRAH IBRAHIM JC
[CIVIL APPEAL NO: R2-14-01-2003]
10 DECEMBER 2004

C ***REVENUE LAW:*** *Income tax - Trade association - Decision of Special Commissioners of Income Tax (SCIT) - Appeal against - Whether SCIT erred in point of law on issues raised - Legal Profession Act 1976, ss. 142(1) & 142(2) - Whether read separately - Whether respondent liable to tax - Whether Malaysian Bar a trade association - Whether*
D *s. 53 of the Income Tax Act 1967 applicable - Whether Malaysian Bar exempted from tax on compensation fund - Legal Profession Act 1976, s. 80(13) - Whether Legal Profession Act 1976 prevails over Income Tax Act 1967 - Whether respondent entitled to capital allowances deductions - Whether SCIT's findings upheld - Federal Constitution, art. 96 - Legal*
E *Profession Act 1976, ss. 41, 42, 42(1),78*

This was an appeal by the Director of Inland Revenue Board (the appellant) against the deciding order of the special commissioners of income tax (SCIT). In the deciding order dated 25 January
F 2002, the SCIT had allowed the appeal of the Malaysian Bar (the respondent). Briefly, the facts admitted and extracted from the case stated was that the respondent is a body corporate presently established under s. 41 of the Legal Profession Act 1976 (LPA). Members of the respondent are advocates and solicitors admitted
G and enrolled under the LPA or any other written law prior to the coming into operation of the LPA. Income received by the respondent for the years of assessment 1979 to 1991 in respect of subscriptions, contributions and donations from its members were raised by the appellant. No assessment to tax was raised in
H respect of contribution by respondent members to the building fund and the compensation fund but the appellant had taxed the interest income derived from the compensation fund for the years of assessment 1979 to 1991. In raising the assessment to tax, the appellant treated the respondent as a trade association within the
I ambit of s. 53 of the Income Tax Act 1967 (ITA). The respondent had objected to this treatment on the basis that s. 53 of the ITA was inapplicable. The SCIT had found in favour of the respondent and hence, this present appeal. The appellant

herein claimed that the SCIT had erred in law and sought this court to intervene with such orders. The issues before this court were (1) whether by reason of s. 142 of the LPA, the respondent was liable to tax;(2) whether s. 53 of the ITA applicable to the respondent; (3) whether income derived from compensation fund was chargeable to tax in the light of s. 80(13) of the LPA (4) whether respondent was entitled to capital allowances deduction.

Held (dismissing the appeal):

[1] The court was in full agreement with the reasoning of the SCIT in their findings. In essence: (a) s. 142(1) and 142(2) of the LPA is to be read separately; (b) it was correct for SCIT to go through the historical basis; (c) clearly there was a drafting error due to the oversight of the drafter of the legal profession bill; and if there was any ambiguity of the bill, it must be construed in favour of the taxpayer and (d) a purposive approach should be taken in the interpretation of the ITA and the LPA instead of the literal approach to ensure there was no surplusage and absurdity. As such, there was no justification to reverse the determination of the SCIT on this particular issue. (paras 18 & 19)

[2] What is termed as 'trade association' in the context of an income tax legislation, is that, such organisation must satisfy all the following conditions such as (a) it was formed by two or more persons for a common cause; (b) the members voluntarily got together to form the association *ie*, the members become members of the association voluntarily; and (c) the object of the association is to produce income, profits or gains. Here, none of the said conditions befits on the respondent and henceforth, the Malaysian Bar is not a trade association by such virtue. The object of the respondent as set out in s. 42(1) of the LPA is not to produce income, profit or gain but rather to uphold the cause of justice, and to improve standards of conduct of the legal profession, etc. Nowhere in s. 42(1) of the LPA is it stated that safeguarding or promoting the business of its members is the main object of the Malaysian Bar. Section 53 of the ITA was undoubtedly not applicable to the respondent. (paras 28, 29, 30 & 32)

[3] Section 80(13) of the LPA stipulates that the Malaysian Bar be exempted from tax on the compensation fund. The said provision is constituted under art. 96 of the Federal Constitution which provides "No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law." The LPA is a specific legislation whilst the ITA is a general legislation. Where there is a conflict between the LPA and ITA provisions, the LPA prevails. (paras 39 & 40)

[4] The respondent, being a statutory body, was entitled to claim for capital allowances deduction in accordance to s. 78 of the ITA. (para 41)

[SCIT's findings upheld; all tax paid by the respondent be refunded by the revenue.]

Case(s) referred to:

Director of Customs Federal Territory v. Lee Cheng Chye, Liquidation of Castwell Sdn Bhd (In Liquidation) [1995] 3 CLJ 316 SC ***(refd)***

Indian Sugar Mills Association v. The Commissioner of Income Tax [1984] ITR 592 ***(refd)***

IRC v. Hincy 38 TC 625 ***(refd)***

Maughan (Surveyor of Taxes) v. Free Church of Scotland [1893] 3 TC 207 ***(refd)***

National Land Finance Co-operative v DGIR [1993] 4 CLJ 339 SC ***(refd)***

Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia [2000] 3 CLJ 659 CA ***(refd)***

The Malaysian Bar & Anor v. Government of Malaysia [1987] 1 CLJ 459; [1987] CLJ (Rep) 185 SC ***(refd)***

Legislation referred to:

Federal Constitution, art. 96

Income Tax Act 1967, ss. 44(6), 53(1)(a), (3), 78, 127(1)(b), (3)(b)

Legal Profession Act 1976, ss. 41, 42(1)(e), 57(e), 78, 80(13), 142(1)(e), (2)

Income Tax Act 1970 [Sing], ss. 13(1)(e), 37(2)(e), First schedule

For the appellant - Norhisham Ahmad (Shafini Abdul Samad & Muhammad Farid Jaafar with him)

For the respondent - Nik Saghir Mohd Noor (Anand Raj & Irene Yong Yoke Ngor with him); M/s Shearn Delamore & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Wan Afrah Ibrahim JC:

[1] This is an appeal by the Director of Inland Revenue Board (the appellant) by way of a case stated against the deciding order of the special commissioners of income tax (SCIT). In the deciding order dated 25 January 2002, the SCIT held in favour and allowed the appeal of the taxpayer which is the Malaysian Bar (the respondent) pertaining to all four (4) issues for determination before them.

[2] Briefly, the facts admitted and extracted from the case stated are as follows:

(1) The respondent is a body corporate presently established under s. 41 of the Legal Profession Act 1976 (LPA) and having its registered address at 10th Floor, Wisma Kraftangan, No 9 Jalan Tun Perak, 50050 Kuala Lumpur.

(2) The respondent is an institution functioning within the provisions of the LPA. Members of the respondent are advocates and solicitors admitted and enrolled under the LPA or any other written law prior to the coming into operation of the LPA.

(3) Income received by the respondent for the years of assessment 1979 to 1991 in respect of subscriptions, contributions and donations from its members have been raised by the appellant.

(4) No assessment to tax has been raised in respect of contribution by respondent members to the building fund and the compensation fund.

(5) The Minister of Finance (MOF) by powers under s. 127(3)(b) of the Income Tax Act (ITA) granted tax exemption to the respondent in relation to its income other than:

(a) income derived from its compensation fund;

(b) dividend income; and

(c) development income.

(6) The appellant has taxed the interest income derived from the compensation fund for the years of assessment 1979 to 1991.

(7) In raising the assessment to tax, the appellant has treated the respondent as a trade association within the ambit of s. 53 of the ITA 1967.

(8) The respondent objected to this treatment on the basis that s. 53 of the ITA is inapplicable and should s. 53 of the ITA 1967 be applicable, the judicially recognised principle of mutuality would apply.

[3] In the present appeal before this court, the appellant claimed that the SCIT had committed errors in point of law on the issues raised, and sought this court to intervene with such orders.

Issues And Findings

Whether By Reason Of s. 142 Of The LPA 1976, The Respondent Is Liable To Tax

[4] The appellant submits that the SCIT in construing s. 142(2) of the LPA fails and/or neglects to take into consideration s. 142(1) which clearly explains the scope of application of s. 142 as a whole, which is:

> 142 No estate duty payable for bequest to the Bar
>
> (1) No estate duty shall be payable in respect of any amount of any bequest to the Malaysian Bar, and the value of the property passing on the death of a deceased donor shall not be deemed to include the amount of the bequest for the purpose of assessing the rate of estate duty.
>
> (2) The Board and the Malaysian Bar shall each be deemed to be:
>
> (a) an institution specified in the First Schedule to, and under paragraph (e) of subsection (1) of section 13 of the Income Tax Act 1967; and
>
> (b) an institution of a public character approved by the Minister for the purpose of paragraph (c) of section 37 of the Income Tax Act 1967.

[5] With reference to the above, the appellant contended that the SCIT had erred in law by failing to consider that sections in a statute constitute the principle of enacting part of that statute. Every section of a statute is substantive enactment in itself. Each section in each Act must, for its true meaning and effect, depend on its own language and context and setting.

[6] Counsel for the appellant further reiterated that the intention of Parliament can be found from the heading of s. 142(1), whereas, s. 142(2) elaborates the intention set out in s. 142(1) of the LPA. Even though should there be any error in the provision of s. 142(2) of the LPA, it still has to be read together with s. 142(1) of the LPA. The error (if there is any) does not give the respondent the freedom to single out s. 142(2) and that it be read out of context of s. 142 of the LPA as a whole. Such error was found in the LPA and not in the taxing statute.

[7] The appellant's counsel argued that it is duty bound of the Malaysian Bar to bring forward to Parliament for any amendments to be made and that includes amendment to any error found in the LPA (inclusive of s. 142(2)). As the Malaysian Bar has failed or neglected to make effect to such amendment, it cannot then invoke s. 142(2) of the LPA to its benefit.

[8] The appellant further submits that the SCIT had erred in law by failing to consider the rules for interpretation of exemption provisions of taxing Acts. The general rules of the tax law is that, to be liable to tax, the subject matter must fall clearly within the words of the charge imposing tax. In short, the approach to a literal meaning is preferred and the appellant finds support in *IRC v. Hincy* 38 TC 625 (p. 138 of IOP), where Lord Reid stated as follows:

> Difficulties and extravagant results of this kind caused Diplock J, and the Court of Appeal to search for an interpretation which yield a more just result. What we look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the Crown's contention. But we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences and however strongly we may suspect that this was not the real intention of Parliament.

[9] On the same premise, the appellant submits that for one to be exempted from tax, he must fall clearly within the words of the statute. If the provisions of the Act is erroneous or ambiguous, the court should not rule in favour of the taxpayer. In the case of *Maughan (Surveyor of Taxes) v. Free Church of Scotland* [1893] 3 TC 207, p 210 (p 212 of IOP):

A ... but if you claim exemption you must fall clearly within the words of the statute, or if cannot be allowed by ingenious arguments such as were presented to us by Mr Jameson.

[10] Profoundly the appellant states that the SCIT was wrong to decide that s. 142(2) of the LPA is an exemption provision for the Malaysian Bar. The appellant submits that before an exemption is to be granted, clear and unambiguous provisions must be spelt out. Thus, it is wrong for the SCIT to hold that s. 13(1)(e) mentioned in s. 142(2) of the LPA refers to s. 127(1)(b) of the ITA 1967.

[11] In contrast to the appellant's submission, the respondent submits that the decision of the SCIT is correct in law and that the appellant's appeal should be dismissed on this Question 1. Such decision is evident where s. 142(2) of the LPA is a special Act which must override the ITA being a general Act. The respondent's counsel submits that the head-notes of s. 142 of the LPA are not part of a section and it cannot be read in a manner which is absurd. The respondent's counsel also argued that s. 142(1) deals with estate duty whilst s. 142(2) deals with income tax and therefore it cannot be "interdependent".

[12] In the matter of s. 142(2) of the LPA which contains drafting errors, counsel for the respondent explained that it was very much based on the Singapore LPA 1970 wherein s. 137 of that Act mentions ss. 13(1)(e) and 37(2)(e) of the Singapore Income Tax Act 1970. In the said ss. 13(1)(e) and 37(2)(e) and the first schedule of the Singapore Income Tax Act 1970 refer to tax exemption provisions which are in *pari materia* with the repealed Malaysian Income Tax Ordinance 1947.

[13] Counsel for the respondent additionally expounded a historical background to the following which was not rebutted by the appellant:

(a) the history of the LPA, the Singaporean LPA, the Malayan ASO, the Singapore ASO and the Malaysian and Singaporean Income Tax Ordinances (ITOs) and Income Tax Acts (ITAs),

(b) the intention of Parliament to exempt the taxpayer; and

(c) that the repeal of Part II of schedule 6 to the ITA does not repeal s. 142(2) of the LPA.

[14] The respondent's counsel reiterated that the Parliament was clearly aware of the ITA when s. 142(2) of the LPA was drafted and questioned how else could ss. 80(13) and 142(2) enact a principal exemption.

[15] In summation, the respondent's counsel submits that the best interpretation to the ITA and LPA provisions is a purposive interpretation following *Syed Mubarak b Syed Ahmad v. Majlis Peguam Malaysia* [2000] 3 CLJ 659. Also, as propounded in Malaysian law that any ambiguity in a taxing provision or a tax exemption provision is to be construed in favour of the taxpayer, following the *National Land Finance Co-operative v. DGIR* [1993] 4 CLJ 339; [1979-1996] AMTC 1565.

[16] In deliberation to this issue (Question 1), the SCIT in the case stated at para. 3 of p. 71 held:

> It is therefore our view in the light of the above, the acquired right of exemption from income tax given under s. 142 of the LPA subsists till to date.

[17] At paras. 3 and 4 of p 84 concludes:

> In the premise we could not but in all fairness come to any other conclusion except the inescapable finding that by incorporating s. 142(2) into the LPA, the legislature had clearly envisaged an intention to grant an exemption to the appellant from income tax.
>
> In the light of the foregoing we hold that by reason of s. 142(2) of the LPA, the appellant is not liable to income tax.

[18] From my stand point (having heard the submissions of both parties and a perusal into the SCIT's case stated), I am satisfied and in agreement fully with the reasoning of the SCIT in their findings. In essence:

(a) section 142(1) and 142(2) is to be read separately;

(b) it was correct for SCIT to go through the historical basis;

(c) clearly there was a drafting error due to the oversight of the drafter of the legal profession bill; and if there is any ambiguity of the bill, it must be construed in favour of the taxpayer;

(d) a purposive approach should be taken in the interpretation of the ITA and the LPA instead of the literal approach to ensure there is no surplusage and absurdity.

[19] As such this court has no justification to reverse the determination of the SCIT on this particular issue.

Whether s. 53 Of The Ita Is Applicable To The Respondent

[20] The appellant submits that in s. 53 of the ITA, one has to look at the objectives and the purposes of its establishment of an association as well as its activities, in order to ascertain whether an association falls under the category of trade association within the ambit of s. 53 of the ITA.

[21] With reference to the above, the appellant submits that the SCIT in the case stated had erred in law by only having considered certain objectives as provided by s. 42 of the LPA and concluded that the respondent is not a trade association.

[22] The appellant submits that all objects stated in s. 42 of the LPA are the main or principle objects of the respondent and that there is nothing in the section to indicate that certain objects are primary or ancillary. The appellant finds support in the case of *Indian Sugar Mills Association v. The Commissioner of Income Tax* [1984] ITR 592, p 595 (p 219 of IOP).

[23] The appellant submits that based on the objects stated under s. 42 of the LPA, it clearly shows the establishment and the objectives of the respondent are in accordance with the main object stipulated for "trade association" under s. 53(3) of the ITA that is; "safeguarding and promoting the business of its members". In particular, under s. 42(1)(e) of the LPA:

> (e) to represent, protect and assist members or of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia;

[24] In addition by virtue of s. 57(e) of the LPA, the respondent is mandated:

> (e) to represent members of the Malaysian Bar or any section thereof or any particular member in any matter which may be necessary or expedient.

[25] Henceforth, it is the submission of the appellant that the Malaysian Bar is a trade association and as a trade association, the income is deemed to be gross income from a business by virtue of s. 53(1)(a) of the ITA. A trade association is deemed to have a business source of income on its receivables from the

revenue account which include subscriptions and entrance fees. The respondent's counsel rebutted the appellant's claims and contentions by explaining that the Malaysian Bar is not a "trade association" as defined in s. 53 of the ITA. For it to be a "trade association" it must first of all be an "association of persons". In this case, the Malaysian Bar is not an "association of persons" because it lacks the essential ingredients of an "association of persons" in that:

(i) it was not formed by its members but by statute;

(ii) the advocates and solicitors do not voluntarily become its members. There is no volition on their part to be members.

(iii) the object of the Malaysian Bar is not to produce income, profit or gain.

(iv) the taxpayer is a creature of statute and its primary object is to uphold the cause of justice without fear.

[26] Counsel for the respondent reiterated that the income of the Malaysian Bar cannot be deemed to be income from business pursuant to s. 53(1) of the ITA because the income was not received on revenue account but for various specific purposes.

[27] To me, it is obvious that there are merits to the respondent's contention that the Malaysian Bar is not a trade association, and s. 53(1)(a) of the ITA therefore does not apply and that its income is not taxable.

[28] As to what is termed as "trade association" in the context of an income tax legislation, is that, such organisation must satisfy all the following conditions:

(a) it was formed by two or more persons for a common cause.

(b) the members voluntarily got together to form the association, ie, the members become members of the association voluntarily; and

(c) the object of the association is to produce income, profits or gains.

[29] To me, if any of the above conditions is not satisfied, the organisation cannot be recognised as an "association of person" for tax purposes. Here, I find that none of these conditions befits on the respondent and henceforth, I find that the Malaysia Bar is not a trade association by such virtue.

[30] It is clear that the object of the Malaysia Bar as set out in s. 42(1) of the LPA is not to produce income, profit or gain but rather to uphold the cause of justice, and to improve standards of conduct of the legal profession, etc. Nowhere in s. 42(1) of the LPA is it stated that "safeguarding or promoting the business of its members" is the main object of the Malaysian Bar. Appropriately, I refer to the Supreme Court case of *The Malaysian Bar & Anor v. Government of Malaysia* [1987] 1 CLJ 459; [1987] CLJ (Rep) 185, where Mohd Azmi SCJ said (as he was then):

> The Malaysian Bar is a professional body and as a professional body, the interest of the profession overrides the interest of its members.

[31] On the assertion made by the appellant that the SCIT erred in law in not treating the whole objects as stated in s. 42 of the LPA as the main and primary objects, I find that it is devoid of merit, for the SCIT in their case stated have considered all objects under the said section:

> Moreover, we are of the view that the various objects of the appellant as set out under s. 42 of the LPA taken in its totality, do not indicate that the appellant is a profit making entity.

[32] On the premise above, I see that this issue (Question 2) as contended by the appellant is devoid of any merit. Undoubtedly, s. 53 of the ITA is not applicable to the respondent.

Whether Income Derived From Compensation Fund Is Chargeable To Tax In The Light Of s. 80(13) Of The LPA

[33] Section 80(13) of the LPA provides that:

> (13) The income derived from the Compensation Fund shall be exempt from income and all other taxes, and the Fund shall be an institution approved for the purpose of section 45 of the Income Tax Act 1967 payments to which shall be good deductions for income tax purposes in arriving at the aggregate income of the person making the payment for the relevant year.

[34] The appellant submits that the honourable SCIT had erred in law by deciding this s. 80(13) of the LPA, exempts the respondent from tax for income derived from the compensation fund when the section states that exemption is only conferred to an institution approved by the Director General of Inland Revenue (DGIR) under s. 44 of the ITA, and in particular s. 44(6) of the ITA. Therefore in order for the appellant to enjoy the exemption accorded to them under the said section, approval from the DGIR shall first need to be obtained.

[35] The appellant reiterated that s. 80(13) of the LPA is not a specific legislation dealing with tax. On matters relating to tax, the court should refer to ITA and not to the other legislation be it whether the legislation was enacted earlier or later. It is the submission of the appellant that if there exists inconsistencies of law, and in this particular business between ITA and LPA, the ITA shall prevail.

[36] Reference is made to case of *Director of Customs Federal Territory v. Lee Cheng Chye, Liquidation of Castwell Sdn Bhd (In Liquidation)* [1995] 2 AMR 2007; [1995] 3 CLJ 316 (p 242 of IOP), the court held that:

> where there are two conflicting provisions of the legislature and the question arises which of the two should govern the case, it is the court's duty to see the terms of which provisions are more appropriate in the circumstances of the case.

[37] The respondent's counsel in reply submits and contends that income from the compensation fund is exempt from tax by virtue of s. 80(13) of the LPA which is federal law. It clearly forms an exception to the chargeability to tax enacted under the ITA and submits that the SCIT, in arriving at their decision, had not erred in law.

[38] The honourable SCIT upon its facts finding, admitted in the case stated as follows:

> 17 The purpose of the compensation fund is to compensate the claim of any person who has sustained loss in consequence or any dishonesty committed by any advocate and solicitor or any of his staff in his practice as such.
>
> 18 The second limb of s. 80(13) of the LPA contains drafting error in referring to s. 45 of the Act.

[39] To me, the language of s. 80(13) of the LPA, clearly stipulates that the Malaysian Bar be exempted from tax on the compensation fund and it is evident that s. 80(13) of the LPA is constituted under art. 96 of the Federal Constitution which provides "No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law."

[40] Obviously, the LPA is a specific legislation whilst the ITA is a general legislation and where there is a conflict between the LPA and ITA provisions, the LPA should prevail. This issue is therefore put to rest in favour of the respondent.

Whether The Respondent Is Entitled To Capital Allowances Deductions

[41] The issue here on capital allowance follows the question whether the respondent is classified as "trade association" and where earlier, I have found that the Malaysian Bar by virtue of s. 53 of the ITA is not a "trade association", it (Question 4) now becomes unnecessary for me to deliberate on it. In short, the Malaysian Bar (the respondent) being a statutory body is therefore entitled to claim for capital allowances deduction in accordance to s. 78 of the ITA.

Conclusion

[42] I hereby uphold the SCIT's findings and in the matter before me, I dismiss the appellant's claim with costs and direct that all tax paid by the respondent be refunded by the revenue.